John S. EDMUNDS,

Petitioner-Appellee,

v.

Robert WON BAE CHANG,
Individually and in his capacity as
Judge, First Circuit Court,
State of Hawaii,
Respondent-Appellant.

No. 74-1463.

United States Court of Appeals,
Ninth Circuit.

Jan. 2, 1975.

George Pai, Atty. Gen. of Hawaii, Honolulu, Hawaii, for respondent-appellant.

Paul N. Halvonik, of Friedman, Sloan & Halvonik, San Francisco, Cal., Burnham H. Greeley, Honolulu, Hawaii, for petitioner-appellee

Before LUMBARD,* KOELSCH and DUNIWAY, Circuit Judges.

KOELSCH, Circuit Judge:

The primary question on this appeal is whether a person against whom a fine has been

*The Honorable J. Edward Lumbard, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

imposed by a state court is "in custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2254. The district court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ, 365 F.Supp. 941 (D. Hawaii 1973). 1/ We disagree on the jurisdictional question and, accordingly, reverse.

We are fully aware that the Supreme Court in recent years has extended the scope of the Great Writ to persons whose circumstances fall outside conventional notions of physical custody. See, e.g., Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed. 2d 294 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Strait v. Laird, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L. Ed.2d 426 (1968); Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

In Hensley, the Court recognized the trend of its recent decisions, emphatically denouncing such interpretations of the habeas corpus statute as "would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." 411 U.S. at 350, 93 S.Ct. at 1574. It also put the custody requirement of the statute in perspective:

1/ The facts of this case are fully set forth in the district court's opinion.

> "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." 411 U.S. at 351, 93 S.Ct. at 1574.

Applying these principles to the case before us, we conclude that there is insufficient "custody" present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy.

The sole punishment confronting Edmunds is a $25 fine; there is no provision in the sentence for his confinement in the case of non-payment. True enough, a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders. Hence a fine may in some circumstances ultimately prove to be the price of freedom. But until confinement is imminent--as it was in Hensley where only a stay held off execution of the petitioner's one-year sentence--the "special urgency" justifying use of the habeas remedy is notably absent.2/

2/ That the instant case is not governed by the holding of Hensley is clear from the Supreme Court's statement of the issue there:

In this regard, we reject the district court's conclusion that the threat of confinement raised by a pending contempt proceeding based on Edmunds' failure to pay the fine supplies the requisite "custody"; should the stay presently in force be lifted, the resultant hearing could have any number of possible outcomes, only one of which is incarceration. At this juncture, confinement is no more than a speculative possibility--"the unfolding of events may render the entire controversy academic." Hensley, supra, at 352, 93 S.Ct, at 1575.3/

2/ (continued)
"The question presented for our decision is a narrow one: namely, whether the conditions imposed on petitioner as the price of his release constitute 'custody' as that term is used in the habeas corpus statute." 411 U.S. at 348, 93 S.Ct. at 1573 (emphasis added).
Cf. Huante v. Craven, 500 F.2d 1004 (9th Cir. 1974).

3/ Here we cannot say that the conclusion that petitioner is not in custody "would do no more than postpone this habeas corpus action until petitioner [has] begun service of his sentence." Hensley, supra, at 352, 93 S.Ct. at 1575. No sentence of confinement presently exists, and none may be forthcoming.

Neither do we agree that the possibility of disciplinary action against Edmunds provides the requisite "restraint on liberty." No showing has been made that such a proceeding is pending or even contemplated. Moreover, in view of the nature of the record upon which the conviction of contempt is based, the imposition of professional discipline appears most unlikely.4/

Nor do we agree that the existence of the contempt judgment amounts to a severe restraint on Edmunds' liberty because it injures his reputation as a lawyer or adversely affects the "delicate balance of [his] harmony with the courts." 365 F.Supp. at 944. He has made no showing of either of these supposed effects of the judgment, and such incidental professional disability as we may presume exists under the circumstances is insufficient to provide the requisite restraint.5/

4/ Of the six judges who have reviewed the facts claimed to constitute the contempt (the district judge and five justices of the Hawaii Supreme Court), three held the conduct contemptuous and three held it was not. Were we to reach the merits here, we might have considerable difficulty labelling the determination of the district court (that the conduct was not contemptuous) clearly erroneous.

5/ By the same logic, a taxi-driver might argue that he is "in custody" by reason of a fine for a traffic violation. Cf. Westberry v. Keith, 434 F.2d 623 (5th Cir. 1970).

What we have here is the imposition of a fine, pure and simple. We trust that whatever Congress meant by the word "custody" when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a "fine only" sentence. The Court has made clear in Hensley that the custody requirement exists to distinguish between "severe restraints on individual liberty" and those which are not severe. If the latter category does indeed exist, we are clear that a "fine only" sentence falls within it.6/

Reversed and remanded with instructions to dismiss the petition.

6/ We read neither Settler v. Yakima Tribal Court, 419 F.2d 486, 489-490 (9th Cir. 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), nor Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), as controlling.

In Yakima, this court held "that before the effective date of the Indian Civil Rights Bill, habeas corpus was available as a device to obtain review of decisions of the Yakima Tribal Court even where the one convicted was fined rather than given a prison sentence." Settler v. Lameer, 419 F.2d 1311, 1312 (9th Cir. 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970). We observed in Yakima that the petitioner had "no other procedural recourse for effective judicial review of the constitutional issues he raises." 419 F.2d at 490 (emphasis added). Moreover, the provision of Settler's sentence providing for his suspension from fishing activities in the event he failed to pay the fine provided a significant restraint on his

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6/ (continued)
liberty under all the circumstances of that case.

In Weiss, where the sentence on one of five counts of contempt was a fine only, we reviewed the propriety of all five convictions; but the issue of "custody" was neither argued nor discussed in the opinion.

John S. EDMUNDS, Petitioner,

v.

Robert Won Bae CHANG,
Individually and in his capacity as
Judge, First Circuit Court,
State of Hawaii, Respondent.

Civ. No. 73-3926.

United States District Court,
D. Hawaii.
Nov. 2, 1973.

David C. Schutter, Burnham H. Greeley, Padgett, Greeley, Marumoto & Steiner, Honolulu, Hawaii, for petitioner.

Robert P. Jaress, Deputy Atty. Gen., George Pai, Atty. Gen. of Hawaii, Honolulu, Hawaii, for respondent.

DECISION AND ORDER

SAMUEL P. KING, District Judge.

Petitioner Edmunds is an attorney licensed in the State of Hawaii. Respondent Chang is a judge of the First Circuit Court of Hawaii. On January 23, 1973, Edmunds was representing a defendant in a criminal case before Judge Chang. During the course of the proceedings,

he was found summarily to be in contempt of court. Later on the same day he was served with a written order and judgment of contempt, directing him to pay a fine of $25 within 48 hours. 1/ Before the expiration of that time,

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1/ ORDER AND JUDGMENT OF CONTEMPT. The trial of the above-entitled cause having duly commenced on Monday, January 22, 1973; and

At the commencement of the further trial on Tuesday, January 23, 1973, after the court bailiff had opened court and as the Court was in the process of noting the presence of defendants, [sic] counsel, etc., and before the Court was able to utter a single word, Mr. John S. Edmunds, attorney for defendant Steven M. Hayashida, having stood up and interrupted the proceedings and requested permission to approach the Bench; and

The Court having requested the said Mr. Edmunds to be seated and having denied permission to approach the Bench, and the said Mr. Edmunds having refused to be seated but having continued to request permission to approach the Bench; and

The Court thereafter having ordered said Mr. Edmunds to be seated, and the said Mr. Edmunds having failed to comply with the order of the Court; and

The Court having found Mr. Edmunds in Contempt of Court for failure to obey the order of the Court to be seated and having fined the said Mr. Edmunds the sum of twenty-five dollars ($25.00), payable within forty-eight (48) hours; (footnote continued on next page)

Edmunds moved the court to reconsider its judgment, or in the alternative, to stay the order through January 30, so that he could seek appellate review. 2/ On January 29, he was ordered to appear before Judge Chang four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order.

(footnote 1/ continued)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that based on the foregoing proceedings, the said Mr. John S. Edmunds is hereby found in Contempt of Court, and is hereby fined the sum of twenty-five dollars ($25.00), payable within forty-eight (48) hours from the filing of this Order and Judgment. [See file in State of Hawaii v. James Pokini, et al., Cr.No. 44262, First Circuit Court, State of Hawaii.]

2/ The motion was based on two grounds: 1) The judgment and order failed to specify the section of the contempt statute on which it purported to be based, although such specification is required by law; 2) Petitioner's conduct was insufficient as a matter of law to constitute contempt.

Edmunds alleges that on January 26 he asked what action Judge Chang proposed to take on the motion, and was told "you will be informed."

Direct appeal not being permitted,3/ Edmunds then sought a writ of prohibition from the Hawaii Supreme Court, and that court restrained Judge Chang from proceeding further while it considered the writ. The writ of prohibition was ultimately denied, in a 3-2 decision, and Edmunds is now before this Court applying for a writ of Habeas Corpus under 28 U.S.C. §2254.

Edmunds has exhausted his state remedies.

Still, the respondent argues that Edmunds cannot satisfy the requirements of §2254 4/ because "the sentence did not impose imprisonment."

The statute does not, on its face, require that there be a sentence of imprisonment before a federal court can assume habeas corpus jurisdiction. §2254 refers simply to "a person in custody pursuant to the judgment of a State court." The meaning of the custody requirement has been the subject of protracted debate, but there has been a tendency in

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3/ Penal Code §1077(5); Act 9, Session Laws of Hawaii, 1972.

4/ 28 U.S.C. §2254(a): The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

the decided cases not to impose too rigid a limitation on the boundaries of federal jurisdiction. In Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the Supreme Court indicated that it "has generally looked to common-law usages and the history of habeas corpus both in England and in this country" to help determine availability of the writ. Jones emphasized the wide range of situations, extending even to child custody disputes, in which habeas corpus relief has been historically available. In this context, the Court concluded that the imposition of "restraints not shared by the public generally," and not only actual confinement, could justify issuance of the writ.

Although it did not attempt a specific delineation of those "restraints," the Court in Jones unanimously held that a parolee although released from custody was sufficiently deprived of his liberty to have access to habeas corpus. The decisive factor is that the conditions of parole "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." Habeas corpus, furthermore,

> "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongfull restraints upon their liberty." 371 U.S. 243, 83 S.Ct. 377.

A steady trend toward liberalization of the custody requirement has followed Jones. A particularly important factor in many of these cases has been that of providing prompt adjudication of the petitioner's constitutional claims, one of the fundamental purposes of habeas corpus. See, e.g., Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Perhaps even more importantly, there has been an expansion in the spirit of the law, in the attitudes with which federal habeas corpus is to be considered. In Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), the Court declared:

> The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected. 394 U.S. 291, 89 S.Ct. 1086.

It is in this spirit that the Court has proceeded in its recent examination of the custody requirement. In Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), the petitioner was a former state prisoner who had been released after the expiration of his sentence. Strait v. Laird, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) dealt with a military reservist on orders to report for active duty and seeking classification as a conscientious objector. He filed his petition in California, his home state; his "nominal custodian" was the commander of a personnel center in Indiana, where his records were kept. The petitioner

"was never in Indiana or assigned there." Nevertheless, the Court found that "[t]he concepts of 'custody' and 'custodian' are sufficiently broad" to provide a basis both for habeas corpus and for jurisdiction in California. Significantly, none of the other three dissenting Justices joined with Justice Rehnquist in the view that the petitioner was not in custody "at all."

The nature of the restraints to which the petitioner here is subjected are surely as severe as those in Strait. It is not merely the original contempt citation which is before this court; Edmunds has been ordered to show cause why he should not be held in further contempt for failing to pay the fine imposed upon him. The consequences of the pending action could be grave. An attorney's reputation is his principal professional asset; the success of his efforts often depends upon a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere "moral restraint" to one who occupies the status of an officer of the court. Moreover, under Hawaii law there is at least the potential for disciplinary action being taken against an attorney who is found in contempt. 5/

5/ Rule 16, Unprofessional Conduct and Unauthorized Practice of Law, Rule of the Supreme Court of the State of Hawaii.

Finally, Edmunds points to very similar cases in which Judge Chang has found attorneys in contempt and then placed them in custody pending the payment either of the fine he has summarily levied or of a cash bail he has imposed. 6/

The rationale employed by the Supreme Court in Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973), finding "custody" where a habeas corpus petitioner has been released on his own recognizance, is just as compelling here:

> Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim. 411 U.S. 352-353, 93 S.Ct. 1575.

This steady widening of habeas corpus jurisdiction is underlined by the recent decision in Weiss v. Burr, 484 F.2d 973 (9th Cir., 1973). In Weiss, an attorney was cited on five separate contempt charges during the course of a state criminal trial. He sought habeas corpus relief, but it was denied in the District Court. The Court of Appeals, however, noted that "[t]he propriety of using a petition for habeas corpus to test the constitutionality of his convictions

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6/ See n. 9.

is unquestionable," despite the fact that he was sentenced merely to pay a fine on one of the counts.

Therefore, bearing in mind the spirit and the logic which higher courts have recently applied to habeas corpus, as well as the circumstances of this case, I find that the petitioner is sufficiently in custody for this court to consider the constitutionality of his conviction.

The events which led to petitioner's contempt citation are here set out in full:

> BAILIFF: The Court of the Honorable Robert Won Bae Chang is now in session. Please be seated.
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> THE COURT: Please be seated.
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> MR. EDMUNDS: Your Honor, --
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> THE COURT: Please be seated.
>
> MR. EDMUNDS: May I approach the bench, your Honor?
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> THE COURT: Please be seated.
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> MR. EDMUNDS: Your Honor, I have an --
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> THE COURT: Please be seated, Mr. Edmunds.
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> MR. EDMUNDS: -- issue I would like to raise.

> THE COURT: The Court orders you to be seated, Mr. Edmunds.
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> MR. EDMUNDS: Your Honor, I'd like the record --
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> THE COURT: If you do not be seated right now Mr. Edmunds, the Court will find you in contempt of Court.
>
> MR. EDMUNDS: May I approach the bench, your Honor?
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> THE COURT: You are found in contempt of Court, Mr. Edmunds. The Court will stand at recess.

The contempt judgment entered by Judge Chang[7/] recites that Edmunds "stood up and interrupted the proceedings and requested permission to approach the bench"; that permission was denied, and that Edmunds "failed to comply with the order of the [c]ourt" which directed him to be seated. The nature of the proceeding which Edmunds is alleged to have interrupted is not stated; the judgment merely says that the court "was in the process of noting the presence of defendants [sic], counsel, etc."

There is no question that the circuit court of the state of Hawaii has statutory authority to punish some contempts summarily. Section 1077 of the state's recently adopted penal code 8/ merely restates a judicial power which

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7/ Supra, n. 1. 365 F.Supp.-60.

8/ Supra, n. 3.

Blackstone thought "as ancient as the laws themselves" 4 Blackstone Commentaries 286. It might be pointed out that both the necessity for summary exercise of the power, and the assumption of its historical basis in the English common law, have been subjected to searching examination. See, e.g., the dissenting opinion of Justice Black in Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); ABA Standards for Criminal Justice, The Function of the Trial Judge, Approved Draft, 1972, § 7.4. Nevertheless, the fact of the power remains.

It is also a power clearly reserved to the federal courts, under 18 U.S.C. § 401 and Rule 42(a), F.R.Cr.P. On both the state and federal levels, however, it must be ringed with constitutional inhibitions, since in the exercise of the power it is thought necessary to dispense with traditional safeguards afforded to those accused of all other offenses.

Rule 42(a), which authorizes summary punishment for contempt committed in the presence of the judge, does not confer a separate or expanded power on the federal courts. Its intent is merely "to make more explicit 'the prevailing usages at law' by which the statute has authorized punishment of contempts." Sacher v. United States, 343 U.S. 1, 7, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952). Moreover, its use is limited to "exceptional circumstances." Harris v. United States,

382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965).

Thus, it is to § 401 that the federal courts must look for their contempt authority. However, since the Supreme Court has held that exercise of any broader contempt power than that allowed by the statute "would permit too great inroads on the procedural safeguards of the Bill of Rights," In Re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 L.Ed.30 (1945), the Court's decisions construing § 401 must be seen as marking the outer limits of state contempt power as well.

"Exceptional circumstances" were surely present in the early case of Ex Parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888), which allowed punishment for contempt "without trial or further proof." In Terry, the wife of an attorney was ordered removed from the courtroom for disrupting the proceedings. As a marshal attempted to carry out the order, he was beaten and assaulted with a knife by the attorney. The attorney was subequently cited for contempt.

In less egregious situations, the Court's historic mistrust of summary punishment has led it to circumscribe use of the "Terry rule." Since the justification for the summary contempt power is "the need for immediate penal vindication of the dignity of the court," Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), the power can only be used to remove or prevent an "obstruction" which is "clearly shown."

Ex Parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656 (1919); In Re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945).

In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) further limits application of the rule to obstructions which present "'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'" Id. at 275, 68 S.Ct. at 508, quoting from Cooke v. United States, supra.

Such an "open threat" before the court can occur only where there is "misconduct . . . which disturbs the court's business . . . and where immediate punishment is essential to prevent 'demoralization of the cour't authority' before the public." Id. at 275, 68 S. Ct. at 509. If the alleged misconduct is merely language, it "'must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . ..'" In re Little, 404 U.S. 553, 555, 92 S.Ct. 659, 660, 30 L.Ed.2d 708 (1972), quoting Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

What is particularly important in this case is that the alleged contemnor is an attorney who was engaged in the defense of a client. In Re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962) involved an attorney who

persisted in a line of questioning which the court had already ruled inadmissible. When he was halted by the judge, he insisted on his right to ask the questions, and he announced his intention to continue doing so unless stopped by a bailiff. A summary contempt judgment against him was reversed. The Supreme Court reasoned that he had not actually persisted to the point where the bailiff was forced to interrupt the trial, and his mere announcement of his intention to do so could not be enough of an obstruction to sustain a judgment of contempt. The Court added:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. 370 U.S. 236, 82 S.Ct. 1292.

A lawyer is certainly under a legal, ethical and moral duty to observe a proper courtroom decorum. But his duty to exert himself on behalf of his client, within the bounds of that decorum, is just as compelling. The ABA Standards for Criminal Justice, The Defense Function, Approved Draft, 1971, has this to say, in section 7.1(d), on the subject of courtroom decorum:

> The lawyer should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judi-

cial conduct which he considers prejudicial to his client's legitimate interests. He has a right to make respectful requests for reconsideration of adverse fulings.

If the entire line of cases in which the Supreme Court dealt with summary contempt leads inexorably to any single conclusion, it is this: because the Court is so wary of the power, and so conscious of its potential for abuse, it is determined, as it has reiterated time after time, to limit courts to "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231 (19 U.S. 204), 5 L.Ed. 242 (1821), quoted in among others, In Re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945); In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); Cammer v. United States, 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956); Harris v. United States, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965); Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

That potential for abuse has been realized often enough to draw the attention of commentators as well as of appellate courts. See, e.g., Homan, Abuse of Attorneys by Judges, 14 Clev.-Mar.L.Rev. 79 (1965). It may well have animated Edmunds as he rose to address the court. From the record here, it cannot be said that any such concern would have been ill-founded. 9/

9/ Edmunds cites examples of this judge's

This case does not concern the limits to which an attorney may go in protesting an adverse ruling. Rather, the focus is on what he may do to get a ruling in the first place, and to make the record which may be so crucial to his client's liberty. It is therefore unlike Fisher v. Pace, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949), where a lawyer was cited for deliberately persisting in a line of argument excluded by the court, and only after he had "twice refused to heed the court's admonition not to argue the point."

A court of law is not the personal fiefdom of the individual who happens to be sitting at the bench. The role of the lawyer defending one accused of crime is every bit as essential in our system of justice as that of the judge, and the courtroom is in many respects more the arena of the former than it is that of the latter. If a lawyer can be denied the opportunity even to address the court on the subject of what he conceives to be valid objection, it is hard to imagine what part of his function as advocate is left to him.

9/ (continued)
behavior toward lawyers who are trying to state objections for the record. These examples include the judge declaring a recess while the lawyer was still speaking, and then calling a new case when the court reconvened, as well as instructing the court reporter not to take the statements of a lawyer addressing the court.

He cannot be denied that opportunity, however, as the Supreme Court made perfectly clear in Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. 343 U.S. 9, 72 S.Ct. 455.

Edmunds' assertion that he spoke throughout in a "low and courteous tone" is not challenged. There is not the slightest indication that his conduct was in any way obstructive, or that it presented an immediate threat of obstruction. A judge who is looking for contempt will probably be inclined to find it, but the summary procedure provided by the Hawaii contempt statute cannot be used as authority for judges to overstep the constitutional limit of their power. The citation of contempt for an attorney's effort to speak before the court transgresses that limit.

It is therefore the holding of this court that petitioner John Edmunds was denied due process of law, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

It is ordered that the judgment and order of the First Circuit Court of the State of Hawaii, dated January 23, 1973, holding petitioner Edmunds in contempt of court, is void and of no force or effect.

It is also ordered that petitioner Edmunds be released from any further proceedings had under the aforesaid void order and judgment.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1108

Mary Walker,

Appellant,

versus

The Hon. George B. Dillard,
Judge, Municipal Court of
Roanoke,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
Ted Dalton, Chief Judge.

Submitted: May 15, 1973 Decided: June 20, 1973

MEMORANDUM DECISION

Mary Walker was convicted of a misdemeanor in the Municipal Court of the City of Roanoke, Virginia, on August 25, 1971, and was sentenced to serve thirty days in jail and to pay a twenty-five dollar fine and costs. The jail term was suspended for six months. On February 22, 1972, having exhausted state remedies, she filed a petition for a writ of habeas corpus in the district court alleging that her conviction was illegal because she was denied her constitutional right to a jury trial and that section 18.1-238 of the Virginia Code, under which she was convicted, is unconstitutional. Without reaching the merits of these allegations, the district court dismissed the petition on the ground that "a thirty day suspended sentence and a twenty-five dollar fine for abusive telephone conversation is not a sufficient 'restraint' to put the petitioner 'in custody' within the meaning of the habeas statutes (28 U.S.C.A. §§ 2241 and 2254)." Walker seeks a certificate of probable cause to appeal from this order. Since we feel the imposition of a suspended sentence does not deprive the district court of habeas corpus jurisdiction when the sentencing court retains the power to activate the sentence, we reverse the judgment and remand this case to the district court to consider the merits of the petition.

Under 28 U.S.C. § 2241(c) (3) federal courts have jurisdiction to entertain writs of habeas

corpus only if the petitioner is "in custody" in violation of the laws or Constitution of the United States While at one time federal judges might well have insisted on actual incarceration before exercising their authority to free state prisoners under this statute, recent Supreme Court decisions make clear that the "in custody" requirement does not necessarily mean actual physical detention in a jail or prison. Rather the term is to be liberally construed as meaning "restraints on a man's liberty, restraints not shared by the public generally. . . ." Jones v. Cunningham, 371 U.S. 236, 240 (1963). See also Hensley v. Municipal Court, ____ U.S. ____, 13 Crim.L.Rep. 3041 (April 18, 1973); Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaValle, 391 U.S. 234 (1968). The various continuing disabilities which necessarily result from a criminal conviction, Sibron v. New York, 392 U.S. 40 (1968), was a sufficient "restraint" of a person's liberty to lead the Court in Carafas v. LaVallee, supra, to hold that habeas jurisdiction over a timely brought petition was not defeated by the release of the prisoner prior to the determination of the habeas proceedings. The Court ruled that the case was not mooted by the prisoner's release while his case was pending insomuch as he still had a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." 391 U.S. at 237 (citation omitted). Similarly, in the most recent examination of the problem, the court held in Hensley v. Municipal Court, supra, that "restraint" included a convicted

defendant's obligation to appear whenever and wherever ordered by any court or magistrate of competent jurisdiction, imposed as a condition of release on his own recognizance. Concluding that this "restraint" satisfied the "custody" requirement of § 2241 the court noted that "[p]lainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim."

We think the rationale of Carafas and Hensley applies to the circumstances of this case. Even though at the time she filed the petition in the district court Walker was not incarcerated, time did remain on her suspended sentence. Under Virginia law the trial court clearly had the power to activate the thirty day sentence "for any cause deemed by it sufficient." Va.Code Ann. § 53-275; Barry v. Commonwealth, 200 Va. 495, 106 S.E.2d 593 (1959). It is inconceivable that there are any significant differences in "restraints" on a man's liberty when he is released on bail, see Hensley, supra, than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration. This is as much of a "restraint" on liberty as parole or probation. See Carafas v. LaVallee, supra; Walker v. North Carolina, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd. on other grounds 372 F.2d 129 (4th Cir. 1967).

Accordingly, a certificate of probable cause to appeal is granted. The judgment of the district court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

/s/ J. Braxton Craven
United States Circuit Judge

/s/ John D. Butzner
United States Circuit Judge

/s/ Donald Russel
United States Circuit Judge